IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
::::

JUDGMENT

Fatehraj
vs
Nar Singh & Anr.

S.B. CIVIL SECOND APPEAL NO.160/2006 AGAINT THE JUDGMENT AND DECREE DATED 9.3.2006 PASSED BY SHRI S.K. PAREEK, RHJS, DISTRICT JUDGE, PALI IN CIVIL APPEAL DECREE NO.68/2003 DISMISSING THE SAME FILED AGAINST THE JUDGMENT AND DECREE DATED 25.8.2003 PASSED BY CIVIL JUDGE (JR. DIV.), PALI

Date of order : 3.12.2007

PRESENT
HON'BLE MR. PRAKASH TATIA, J.

Mr. KC Samdariya, for the appellant.
Mr. RR Nagori, for the respondents.

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BY THE COURT :

Heard learned counsel for the parties.

The appellant is aggrieved against the findings recorded by the two courts below holding that the plaintiffs-respondents are entitled to decree for possession of the suit property. The trial court decreed the suit on 25.8.2003 and the appellant's-defendant's appeal was dismissed by the first appellate court on 9.3.2006, hence, this second appeal.

Brief facts of the case are that plaintiff-trust which was constituted in July, 1982 and got registered on 28th July, 1982 filed the present suit for eviction of the defendant-appellant alleging that the suit property described in detail in sub-para no. (i) of para no.1 of the plaint and portion of that property is in possession of the defendant, description of which is also given in sub-para of para no.1 of the plaint. According to the plaintiffs, the property in question was ancestral property and it was dealt with as their property since long from generation to generation. Thereafter, in the year 1982 they constituted a trust and the same was got registered. Before that constitution of the trust, the part of the property as is referred in the Patta was given to the defendant's father Bheekji and, thereafter, to Bheekji's wife i.e., the mother of the defendant. The appellant's father since become old and he was not in position to manage the property, therefore, he was removed. The details of events are already given in the plaint. The plaintiffs prayed that the decree for possession may be passed in favour of the plaintiffs and against the defendant for the three rooms, one Barmada, one latrine and mesne profit also be granted.

The defendant contested the suit by submitting detail written statement. The trial court framed

issues, which includes whether the plaintiffs are the owner of the property in dispute, whether the defendant is trespasser and plaintiffs have right to take possession from the defendant, whether the defendant has possessory title and if so then what is the effect on the suit, whether the plaintiffs are entitled to mesne profit @ 200/- per month and there are other issues, but they are not much relevant for the purpose of deciding this appeal.

The plaintiffs produced witnesses PW-1 Ram Lal, PW-2 Matu Ram, PW-3 Khinvji, PW-4 Bagaram, PW-5 Sher Singh, PW-6 Gajanand and PW-7 Hariram. In rebuttal to above evidence, the defendant gave his statement only. The documentary evidence was also produced which includes a letter written by defendant, copy of which is marked as Ex.34. Ex.34 is a document wherein there is admission of the defendant that the property is belonging to the plaintiff and he committed mistake by taking wrong plea in the written statement that the property is not belonging to the plaintiff. When the copy of this document was sought to be produced in the trail court, an objection was raised by the defendant about the admissibility of the document, upon which, the trial court vide order dated 28th July, 1993 after holding an inquiry granted permission to produce the copy of the document and, thereafter, the order dated 28th July,

1993 was challenged by preferring revision petition before this Court wherein this Court held that the plaintiff can prove the document in accordance with law. One of the contention of the learned counsel for the appellant is that the trial court observed that by order dated 28th July, 1993 , the court has already decided that the document Ex.34 stands proved and proceeded to decide the suit on the basis of said finding whereas in fact, that finding is contrary to the order of this Court passed in revision petition wherein the trial court's order dated 28th July, 1993 was challenged.

Learned counsel for the appellant vehemently submitted that the trial court though held that the plaintiff is the owner of the property but that finding was reversed by the first appellate court after considering the evidence and that too, after holding that the plaintiffs failed to produce the Patta of the property in dispute. The plaintiffs further failed to prove that original Patta was with them. From the evidence it is proved that plaintiffs might have applied for grant of patta, but admittedly, no Patta was granted to the plaintiffs' ancestors at any point of time. According to learned counsel for the appellant, once the plaintiffs have no title then they cannot recover possession of the property from the defendant. Any person can get the

decree for possession of the immovable property only in accordance with law and by proving his title and if the title is not proved then the possession can be proved by possessory title and for that issue was framed in present case and admittedly defendant is in possession of the property since the time of his father. In view of the finding of the first appellate court against plaintiff about Patta itself, the first appellate court should have dismissed the suit for decree of possession against the defendant.

Learned counsel for the appellant further submitted that the courts below committed serious error of law in drawing presumption for the entries of book of accounts, which were produced by the plaintiffs, which are suspicious in nature and were copies of regularly kept books of account. In view of the judgment of this Court delivered in the case of Sohan Lal Vs. Gulab Chand reported in RLW 1965 346 it is submitted that both the courts below should not have drawn the inference under Section 90 of the Evidence Act and if it could have been taken then that could have been taken at an early stage and not at belated state.

Learned counsel for the appellant also submitted that the letter Ex.34 came from a person who had inimical relation with the defendant and had interest in the plaintiffs, therefore, that letter itself is a

suspicious document. Other ground is that that letter Ex.34 is nothing but a compromise and any compromise if produced in the court in accordance with Order 23 Rule 3 CPC that compromise can be recognized and acted upon and no other document can be acted upon. Learned counsel for the appellant relied upon the judgment of this court delivered in the case of Kalyan & Ors. VS. Smt. Dhanni Bai & Ors reported in 2000(4) WLC (Raj) 306and the judgment of the Punjab and Haryana High Court delivered in the case of Chand Kaur Vs. Raj Kumar (died) reported in AIR 1997 Punjab and Haryana 155.

Learned counsel for the respondents vehemently submitted that no substantial questions of law are involved in this appeal and the two courts below decided the suit in accordance with law after considering the evidence in detail and have not decided the suit only on the basis of either Ex.34, the admission of the plaintiffs made in that document alone nor have decreed the suit by drawing inference under Section 90 of the Evidence Act alone and the courts below clearly held that these documents were fully proved by the witnesses in accordance with law. In view of the above reasons, the findings are based by appreciation of the evidence. Learned counsel for the respondents further submitted that the first appellate court not only found the appellant not

trustworthy but found that he can fabricate any document. In view of the above reason, the appeal deserves to be dismissed.

I considered the submissions of learned counsel for the parties and perused the record.

So far as objection of learned counsel for the appellant that no decree for declaration was sought by the plaintiffs, but still the trial court held that the plaintiffs are the owner of the property is devoid of any force because the plaintiffs' claim in the suit itself is on the basis of their title and the trial court framed specific issue which is issue no.1 that whether the plaintiffs are the owner of the property. When plaintiffs claimed that they are owner of the property and need no declaration of the court and sought relief against the defendant then they can certainly prove their title upon which the court is required to record finding whether the plaintiffs are owner of the property. The issue was contested by the defendant knowing it well that question of title of plaintiffs is being contested by him, therefore the plaintiffs in second appeal cannot rais this objection nor this objection could have been raised on facts as plaintiffs' suit was based on their title and court was required to decide the issue of title of the plaintiffs.

The description of the property as given in the

decree-sheet also has been objected by learned counsel for the appellant. According to learned counsel for the appellant the plaintiffs in their plaint in para no.1 mentioned a bigger property as disputed property, but thereafter, clearly mentioned that portions of the property are in possession of the defendant and for which part of the property,the plaintiffs are seeking decree which is further clear from para no.10 of the plaint, but in the decree-sheet entire property mentioned at page no.2 of the plaint decree for possession was granted. The objection of learned counsel for the appellant may be against the wrong drawing of the decree and not on the question of its merit. The trial court in last para of the judgment, which forms the decree granted decree for “disputed property”, therefore, the property which is of the plaintiffs and is in possession of the defendant and which was in possession of the defendant at the time of filing of the suit, the court has granted decree. Otherwise also, it appears from the facts of the case that defendant's case is not that he is in possession of any property which is not covered by the paramount description of the property and is belonging to the defendant and has different character. Therefore, I do not find any reason to entertain the appeal for correction in decree-sheet, if it is needed at all

nor I found any illegality in the decree-sheet which can be executed by taking help of the plaint for interpreting the decree.

Learned counsel for the petitioner's objection that Ex.34 is a compromise and could have been acted upon only in accordance with Order 23 Rule 1(3) of the CPC is also devoid of force because of the reason that that document has not been submitted for obtaining the decree, but Ex.34 is a document which has been used against the defendant to estop defendant from challenging the title of the plaintiffs. The document nowhere says that it has been signed as a compromise in the suit in hand. The court has not passed the decree only on the basis of Ex.34 but that was treated as piece of evidence corroborating the other evidence available on record in support of title to the property of the plaintiffs. Original copy of the Ex.34 has not been produced in the court, but before that leave was obtained by the plaintiffs by moving appropriate application under Section 65 of the Evidence Act, and the court recorded the finding that original was in existence and this finding was challenged before this Court by the defendant, but that challenge failed, thereafter, the plaintiffs produced this document in evidence and proved it by positive evidence. The two courts below after appreciation of evidence held the

document as proved and for that purpose, they further looked into the signatures of the defendant, which were admitted document of the defendant. This situation came up because of the reason that admittedly, both the hands of defendant imputed because he suffered some injury because of electrocution. The appellant is under impression that finding is based only on the basis of comparison of signature of the defendant, but from the reasons mentioned in detail in the two judgments, it is clear that all other evidence, which proves the defendant's virtual admission of title to the property in favour of plaintiffs are voluminous. None of the document has been mis-read or mis-interpreted by the courts below for recording finding on issue of title in the present case.

I do not find any force in the submission of learned counsel for the appellant that the first appellate court held that the plaintiffs failed to prove their title to the property because plaintiffs' contention about the Patta for the property was rejected by the first appellate court. The first appellate court in para no.23 considered the Patta only and found that plaintiffs' contention that Patta was issued in favour of plaintiffs' predecessor in title has not been proved, that does not mean that court has declared that plaintiff is not owner of the

property. The court only held that Patta has not been proved but other evidence clearly proves that plaintiffs were accepted as owner of the property by the defendant's ancestors mother and father as well as defendant himself.

In view of the above, this Court cannot interfere in the finding of fact recorded by the two courts below even if is of the different view and it is not the case here.

So far as learned counsel for the appellant's contention that no liability can be fastened upon the defendant on the basis of the books of accounts which have not been kept regularly and they are not written daily and their entries are not in the corresponding Khatabahi is concerned, has no application to the facts of the case. The plaintiffs are not fastening any liability upon the defendant on the basis of any books of accounts, but they produced the books of accounts to show that they incurred certain expenditures on the property on various time and paid the salary to the plaintiff's father. In view of the above reasons, the judgment relied upon by learned counsel for the appellants in the case of Sohan Lal (supra) has no application to the facts of the case. I do not find any merit in the appeal and the same deserves to be dismissed.

Learned counsel for the appellant submitted that some time may be granted for vacating the suit premises.

Since the appellant is old person and both the hands of the appellant have been imputed, therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two month from today that he shall hand over the vacant possession of the property in dispute to the plaintiff by or before 31.12.2008 and shall not part with the possession or let out the suit premises during this period and shall pay all the decreetal amount, if due, within a period of three months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.1.2009. The appellant shall also deposit the mesne profit as decreed month by month by 15th day of each succeeding month of calender in the trial court.

In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

(PRAKASH TATIA), J.

c.p.goyal/-